Third World Legal Studies

Volume 13 *Women's Rights and Traditional Law: A Conflict*

Article 7

1-7-1995

Women, Custom, and State Law in Papua New Guinea

Jean G. Zorn

WOMEN, CUSTOM AND STATE LAW IN PAPUA NEW GUINEA

Jean G. Zorn*

This is the story of Wagi Non, a woman who lives in the Western Highlands of Papua New Guinea. No, that is not quite true. This is only a small part of her story—the part in which the law took an interest. I am tempted to say that I know Wagi Non well enough to imagine the rest of her story, but that is only because I know women like her, women who live in the great valleys of Papua New Guinea's central mountains. I can imagine the thatched hut in which she lives, she and her children on one side, her husband's pigs penned on the other. I can recall the weight of the sky that she wakes to each morning, an enormous bowl of blue, scudded with clouds, awesome, yet seemingly touchable from the high valley floor. I can imagine her joining other women in the village to hike down the steep hillside to the river, babies and laundry in bilums (string bags) on their backs, or weeding her gardens, or sitting at noonday under a tree with a group of villagers, teasing, laughing, discussing, evaluating the latest village scandal or conundrum.

Based on the Highlands women whom I know, I expect that, as a girl, Wagi Non helped in the garden, carried small children on her hip, shooed the pigs away from the sweet potatoes. If she did what was expected of her, she married young, and to someone not in her father's clan. Upon marriage, she moved to her husband's village, a place full of strangers where she, a member of an unrelated clan, might never feel quite at home. Probably, however, her husband was young, and she was his only wife, because older men don't command the power they once did, and very few can afford more than one wife today. If she was lucky, the village was still traditional enough so that, as a wife, she would have a house of her own. Her husband

---

*Professor of Law, City University of New York School of Law at Queens College. Grateful acknowledgement for help with this article are due to Stephen Zorn, Penny Andrews, John Webb, Eve Rannels, Librarian at the University of Papua New Guinea Law Library, my students in the Custom and Customary Law course at the Pacific Law Unit of the University of the South Pacific, and the women of Papua New Guinea.

would live in the men's house, visiting her only for the occasional meal or for sex when it was allowed, which was not often, never when she was nursing or menstruating, seldom otherwise, because it is incumbent upon Highlands men not to waste their bodily fluids, the source of their strength and manliness. More likely though, she and her husband lived in one of today's missionized villages, sharing the same small quarters, too close together too often, particularly if he'd been drinking, or angry at her for ignoring his mother's garden in favor of her own, or if she were angry at him for spending the coffee money she'd hoped to use for the children's school fees or a bolt of cloth.

I. The Case of Wagi Non

No, it is not true to say that I know Wagi Non. I do not know the particularities that make her who she is—precisely how old she is, whether she is tall or short, outgoing or quiet, sunny or serious, hard-working or carefree. All I know of her is what a judge of Papua New Guinea's National Court cared to tell us about her in his decision reviewing the actions of one of Papua New Guinea's Village Courts.[1] Wagi Non had been "taken to the Village Court at Kerep on a complaint from relatives of her husband that she had committed adultery. She was ordered to pay compensation. However, she was unable to pay the amount ordered and was therefore ordered to be imprisoned for 32 weeks."[2]

The National Court's decision (and, therefore, this article) omit much that we might want to know about Wagi Non's circumstances. The decision does not say (and, therefore, I cannot tell you) how long Wagi Non and her husband (who is never named in the decision) had been married, whether the marriage was arranged by their parents or

---

[1] *The Application of Wagi Non and In the Matter of the Constitution S. 42(5)*, unreported National Court judgment N959 (1991) (hereafter *Application of Wagi Non*). The National Court is Papua New Guinea's highest-level trial court. Appeals from it go to the Supreme Court. In addition to conducting civil and criminal trials, judges of the National Court also hear appeals from the lower courts—the Village Courts, Local Courts and District Courts.

[2] *Application of Wagi Non* is a four-page mimeographed decision. I quote from it often in this article, and will not include page references to the unreported decision.

chosen by themselves, or whether there had ever been love or friendship between them. We are told only that they were "properly married...according to custom" and that the marriage had lasted long enough to produce four children before her husband left their village in the Highlands to seek plantation work far away on the island of New Britain. Nor does the opinion tell us anything about Wagi Non's alleged adultery, not who the man was nor whether it was a serious or casual relationship nor for how long the affair had lasted. The opinion does say that her husband had been away for five or six years, during which time he had left his wife and children in the care of his relatives, but had neither sent money to her nor visited her. It was not he who brought the complaint against her; it was his relatives, the folks who had been left to take care of her and her children, who (in the pidgin phrase) "courted" her. The Papua New Guinea Village Courts are customary courts, using custom (rather than state statutes or the common law) to resolve the disputes that villagers bring to them, so we must presume that, when the Village Court ordered Wagi Non to pay compensation to her husband's relatives, the magistrates believed that they were acting according to custom. When she could not pay the ordered compensation, the Village Court had her imprisoned, because, as the chairman (the chief magistrate) explained to the National Court, "it is not a good idea for the husband to desert his family for that long a period, but the wife was well looked after by the brothers of the husband, and the adultery is not a good thing to do in the eyes of others."

A judge of the National Court, on a routine visit to the prison, found Wagi Non among the inmates. He ordered an immediate hearing to review the Village Court's decision, and, after taking evidence from the chairman of the Village Court, determined that Wagi Non should be set free. The central fact causing the judge to disagree with the Village Court's disposition of the case was the husband's inexplicably long absence, which the judge characterized as desertion:

> "I cannot help feeling that the going off and leaving the wife and children without his support and protection, yet expecting her to remain bound by custom, is a custom that must be denigrating to her status as a woman. It is denying her the equality provided in the Constitution s. 55. ...The Village Courts must recognize the

> nature of the changes in Papua New Guinea and that the enforcement of custom must not conflict with the principles and rights given in the Constitution.... Customs that denigrate women should be denied a place in the underlying law in Papua New Guinea because they conflict with the National Goals of equality and participation which have been laid down clearly in the Constitution.

The husband's desertion, the judge found, called into question the fairness of a customary rule requiring wives, at all costs, to remain faithful. Indeed, the judge doubted that a rule so inequitable, a rule that holds a woman "bonded almost in slavery to the husband even when the husband neglects her," can any longer be a valid rule of custom. Moreover, the judge wondered how the Village Court could have proceeded with the case in the husband's absence, given that adultery is a wrong against a spouse, not against the spouse's family.

The National Court judge held that, by failing to take account of the husband's desertion, the Village Court had acted unconstitutionally.[3] Wagi Non's imprisonment violated both Section 55 of the Papua New Guinea Constitution, which provides that "all citizens have the same rights, privileges, obligations and duties irrespective of race, tribe, place of origin, political opinion, colour, creed, religion or sex," and the National Goals, which are set forth in the Preamble to the Constitution and which call for "all citizens to have an equal opportunity to participate in and benefit from the development of our country."[4]

---

[3]The National Court also held that the Village Court had acted in contravention of Papua New Guinea's Adultery and Enticement Act 1988. This is discussed at Part IV.D below.

[4]The Constitution declares at Sec. 25(1) that the National Goals are "non-justiciable" and most commentators have taken this to mean that the National Goals are unenforceable and that the courts cannot refer to them in reaching decisions. See, for example, D. Johnson, "Aspects of the Legal Status of Women in Papua New Guinea: A Working Paper," 7 *Melanesian L.J.* 5, at 10 (1979); O. Jessep, "The Governor-General's Wives: Polygamy and the Recognition of Customary Marriage in Papua New Guinea," *Australian J. of Family Law* 29, at 37-38. However, the Constitution would be better served were the word "non-justiciable" to be interpreted to mean merely that the Government cannot be sued for failing to take positive action to carry out a National Goal (for example, for failing to provide perfect, universal health care or educational opportunities) but that laws and the actions of government agencies could be voided in court if they conflicted with the National Goals.

At first blush, it seems that the Village and National Courts did not disagree about what the customary rules on adultery are (or, at least, were). Where they seemed to disagree is on the validity of those rules today. The Village Court seems to have believed that, in ordering Wagi Non's incarceration, it was merely following the dictates of custom. The National Court seems to have held that these customs are not acceptable in contemporary society and under state law. If this is the lesson to be drawn from the case, then one is led to unwelcome conclusions: first, as demonstrated by the Village Court's willingness to consign Wagi Non to prison, customs which are "denigrating to her status as a woman" are still widely observed in Papua New Guinea; and, second, state law offers women their best (perhaps their only) hope of escaping from the inequities of custom. If so, then the position of women in Papua New Guinea is a perilous one, because, despite the supposed superiority of state law, it is a slim reed with which to counter the ingrained authority of customs that people have followed for centuries.

II. Gender Inequality in Papua New Guinea

I write about Wagi Non not because her story is unique, but because it is not. Wagi Non was one of three Highlands women whom the National Court judge freed from prison that month.[5] Each of them had been brought to a Village Court on charges of adultery, ordered to pay compensation and imprisoned when she did not pay it. "That is often to be expected," the judge said about the failure to pay, "Where can she get the money as she is not the breadwinner of the family, her husband is."[6] In 1990, the year Wagi Non was sent to prison, "over 50 complaints were made to the National Court in Mt. Hagen [the capital of the Western Highlands Province] of women being unfairly and harshly treated by Village Courts and sent to jail for marital matters."[7] The judges of the National Court ordered at least forty-four women released from incarceration, noting that "This is quite a large

---

[5]*The Application of Thesia Maip and In the Matter of the Constitution S. 42(5)*, [1991] PNGLR 80; *In the Matter of Kaka Ruk and in the Matter of the Constitution S. 42(5)* [1991] PNGLR 105.

[6]*In the Matter of Kaka Ruk and in the Matter of the Constitution S. 42(5)* [1991] PNGLR 105, at 105.

[7]H. Joku, "Highlands Women have been unfairly treated by village courts - PNG judges," *The Times of Papua New Guinea*, p. 2 (July 18, 1991).

number of cases which in the end appear to be clear discrimination or harsh application of customary laws against women."[8] A number of the cases involved women who had been accused of adultery "following desertion or ill-treatment where the wife is ordered to pay compensation but of course because the wife does not have money she is unable to pay the compensation and therefore ends up in jail."[9] Others involved women who had been fined for attempting to leave their husbands "after being badly treated or being deserted."[10]

The judges thought the problem so severe that they highlighted it in their 1990 Annual Report:

> It is clear there are serious problems existing in the Highlands with respect to family law.... Women are still in a subservient situation, they are not safe unless they have a man to protect them. Men can have several wives and new girlfriends, however, women cannot have several husbands nor mix with other men.... There is no consideration in any breakdown of marriage for the men's neglect or their desertion or their mistreatment.... Men treat women clearly as property and when women wish to exercise their equal rights guaranteed under the Constitution, men create trouble.... The human rights guaranteed under the Constitution are a dead letter for the women in many areas of the Highlands and there is no attempt being made by men and especially by men in positions of power and influence and with modern education to attempt to come to terms with this. The National Court is waging a lone battle to try and bring some meaning and some purpose of the full intent of the Constitution to the people.[11]

---

[8]Papua New Guinea Supreme Court, *Annual Report by the Judges 1990*, p. 7 (Port Moresby: Government Printing Office, 1991). Other cases in which National Court judges freed women who had been imprisoned for failing to obey the orders of Village Courts included *In re Yongo Mondo and the Constitution S. 42(5)*, unreported National Court judgment N707 (1989), overruled in *Supreme Court Reference No. 2 of 1989, re Village Courts Act (c44)* [1988] PNGLR 491; *Application of Rita Raima and In the Matter of the Constitution S. 42(5)*, unreported April 15, 1991; *Application of Epem Mainu and In the Matter of the Constitution S. 42(5)*, unreported April 17, 1991; *Application of Kumi Kas and the Constitution S. 42(5)*, unreported April 17, 1991.

[9]*Ibid.*

[10]*Ibid.* See also F. Senge, "National Court frees village court 'victims'", *Papua New Guinea Post-Courier*, p. 1 (May 10, 1991); J. Bengi, "Seven village court victims freed," *The Times of Papua New Guinea*, p. 1 (May 30, 1991).

[11]Papua New Guinea Supreme Court, *Annual Report by the Judges 1990, supra*, p. 8.

Given the general situation of women in Papua New Guinea today, perhaps the judges ought not to have been surprised at the treatment of women in the Village Courts. Women lag far behind men on every economic or social indicator. Although state-run primary schools are theoretically open to all children whose parents can afford the fees (the fees, while modest, are a burden in a nation where more than 80 percent of the population derive their living primarily from subsistence gardening, fishing and hunting, supplemented by small plots of coffee or other cash crops or the occasional trips to the market in town to sell vegetables or handcrafts), far more boys than girls graduate from primary school, and the gap widens through high school and university.[12] The educational disparity results in an educated elite that is primarily male. It takes little more than the fingers of two hands to count up the number of women who are in the management ranks in business or the public service. Only two women have served in the Papua New Guinea Parliament since the country became independent twenty years ago. There has been only one woman judge of the National Court.

But it is not just a matter of Papua New Guinean women lagging behind in economics or politics. Women are all too frequently the victims of physical abuse. Domestic violence (Papua New Guineans call it "wife bashing") is so widespread, both amongst Papua New Guineans living in traditional rural villages and those who have moved into the towns, that women's groups mounted a massive campaign against it a few years ago. While the campaign, which is still going on, may have sensitized some clergy, police officers, magistrates and judges to the problem, it has not markedly decreased the rate of domestic violence.[13] Violent crimes (felony murders, armed robberies, burglaries accompanied by violence, automobile hijackings) are endemic and increasing in Papua New Guinea's towns, and spreading to its rural villages, and rape seems to accompany the crime

---

[12]D. Johnson, "Aspects of the Legal Status of Women in Papua New Guinea: A Working Paper," 7 *Melanesian L.J.* 5, at 28-29 (1979) and sources cited therein.

[13]S. Toft, "Marital Violence in Port Moresby: Two Urban Case Studies," in Susan Toft (ed.) *Domestic Violence in Papua New Guinea* (Port Moresby: Law Reform Commission of Papua New Guinea, Monograph No. 3, 1985) pp. 14-31; R. Waram, "Change attitudes, not law: Chan," *Papua New Guinea Post-Courier*, p. 4 (July 7, 1995); B. Masike, "Government has failed us, women say at meeting," *Papua New Guinea Post-Courier*, p. 4 (July 7, 1995).

whenever a woman is the victim. Some commentators have suggested that rape is, even more than money, a primary aim of many of the crimes committed by Papua New Guinea's "rascals" (the local term for criminal gangs).[14]

The widespread and pervasive denigration of women may have seemed to the judges to be beyond the reach of merely legal solutions, but the behavior of the Village Courts towards women could be changed by judicial intervention. After all, in the hierarchy of Papua New Guinea's court system, the Village Courts are directly answerable to the District Courts, and ultimately under the authority of the National Court and Supreme Court.[15]

III. The Enigma of Custom[16]

Two things, I think, most disturbed the judges about the Village Courts' inequitable and harsh treatment of women. First, the judges were horrified to find that courts (the institutions of which they themselves are a part, the institutions that are supposed to enforce the law equitably) were involved in discriminatory behavior. Second, the Village Courts claimed that they were making their decisions to send these women to prison on the authority of Papua New Guinea's indigenous norms and values—its customary law. The development of Papua New Guinea's state legal system since the colonial period can be viewed as a battle for supremacy between custom and the

---

[14]Marc Shiltz, "Rascalism: Tradition and the State in Papua New Guinea," in Susan Toft (ed.) *Domestic Violence in Papua New Guinea* (Port Moresby: Law Reform Commission of Papua New Guinea, Monograph No. 3, 1985) pp. 141-160.

[15]Village Courts Act 1989.

[16]I shall use the term "custom" in this article to refer to the norms and values that guide the behavior of villagers in Papua New Guinea—both those norms and values that have existed since the days before colonization and newer norms and values that people have developed as their circumstances have changed. The major differentiation I am making here is between customary norms, those that arise out of lived culture, and state norms, those that are the product of government agencies, such as Parliament or courts. I am not entirely happy with the term. I should prefer to use the phrase "customary law" in order to emphasize that, although these norms do not come from the state, they are equal to state law in their ability to influence people and that the peoples of Papua New Guinea had well-developed legal systems, even without formal legislation, courts, or police, prior to colonization. However, the phrase "customary law" has also come to mean those aspects of custom that have been adopted by state courts, so, in order to avoid confusion, I shall use it only in that sense in this article.

introduced English common law, with the National Court judges frequently criticized for too easily preferring the common law, and for ignoring (or being ignorant of) homegrown custom. Custom had generally seemed to be losing the battle, but at least it had, in the view of the more progressive observers of Papua New Guinea, right on its side—until now. Now, all of us who believed that custom, rather than the introduced laws of England, should form the basis for Papua New Guinea's legal system were confronted with cases in which custom seemed to be in the wrong.

Custom is widely credited—by judges, by scholars, in the newspapers, in tea-break conversations everywhere in Papua New Guinea—not only with forcing women like Wagi Non into the choice between a useless marriage and jail, but with all the other sins perpetrated upon women in modern Papua New Guinea. Many people in Papua New Guinea (including the women who spearheaded the campaign against domestic violence) believe that men bash their wives because custom has always supported men's right to do so. Most people presume that, when rascals commit pack-rape on women, they are merely copying the customary behavior of their grandfathers in long-ago tribal wars. And most people are sure that the country's failure to educate its women and to offer them meaningful employment is rooted in the customary division of labor between the sexes, wherein women worked the gardens while men engaged in war and politics.

The result of this kind of analogizing has been to put many right-thinking people into a quandary. Generally, there is a sizeable overlap between those who support the increased use of custom in the legal system and those who promote better treatment for women. When custom seems to be supporting the denigration of women, should we be supporting women's rights (at the expense of custom) or custom at the expense of women's rights? In addition, it is widely held (probably with justification) that values and behaviors that spring from custom are so ingrained into the social fabric as to be almost irreversible, a belief that leads us to despair of the attempt to change attitudes and actions before we even begin.

The decisions of the National Court in the cases of Wagi Non and her sisters seem to support the assumption that custom discriminates against women whereas state law redresses their wrongs and gives them equal status. It is certainly easy to cast the cases in that light, to retell

them as the stories of National Court judges, armed with the Constitution and state statutes, riding in to save women imprisoned by custom—and thereby to use the cases as further proof of custom's failure to protect and provide for women. But that is not an entirely accurate representation either of custom or of state law. Custom, as it existed in pre-colonial times, may or may not have discriminated against women. From the vantage point of today, looking back to the pre-colonial villages of 100 years ago, we simply cannot be sure. And, even if it did, so much has happened since, so many newer legal modes—colonial law, customary law, state law—have engrafted themselves onto custom that we cannot be sure which is the principal source of the values and attitudes of today's society.

The first problem in determining the source of discrimination against women is in defining what we mean by discrimination. I am not at all sure that we would know how to define discrimination, construct it, recognize it in the very different cultures of pre-colonial Papua New Guinea.[17] Those who believe that the pre-colonial societies in the Papua New Guinea Highlands were discriminatory generally point to specific customs such as polygamy, brideprice, virilocal residence and the division of labor that deprived women of a voice in public affairs as examples of discrimination. They point out that men could have several wives; women could not have several husbands. They see brideprice as a way of buying women, so that women, their labor and their children became the property of their husbands' families. They note that women, especially those who came from enemy clans, could expect little support or protection, let alone understanding and sympathy, when they set up housekeeping in the village of their husband's clan. Finally, they argue that, when men run things, when women are excluded even from speaking out at clan

[17]Papua New Guinea is a land of so many different societies, each with its own customs—some patrilineal, some matrilineal; some chiefly, some not; some requiring the payment of brideprice by the groom's family, others not; some obviously honoring and supporting women, others seemingly not—that it is impossible to reach conclusions that would apply to every Papua New Guinean group. I confine myself in this article (as the judges did in their critique of the Village Courts) to the Highlands area, where societies tended to be similarly patrilineal and patrilocal, depending for leadership on big men who achieved that status rather than upon chiefs who inherited their authority, but even within this area, there are differences. Not everything that I'll say in this article will apply to every Highlands village or clan.

gatherings, things tend to get run the way men, not women, want them to be run.[18]

However, it is equally possible to see each of these customs as benign, even beneficent to women. While polygamy can foster jealousy among wives or leave one wife unattended to, it can also provide women with companions to share friendship and the workload. Brideprice, particularly in Highlands societies, where the bride's family is expected to reciprocate, may not be a one-way transaction, in which the groom buys himself a bride, but the beginning of a lifelong series of exchanges, through which two families cement a relationship of mutual assistance. The dangers to women of virilocal residence (a custom not exactly unknown in European society either) are undercut by the fact that a husband's clan will be concerned for the welfare of their women who marry and move away. Wagi Non's in-laws would treat her as well as they expected their daughters to be treated in their husbands' villages. Finally, while it is true that women did not speak at men's meetings, it was equally true that men did not interfere in women's activities, and who is to say which was the more important? It is our own society that glorifies the male sphere of work and politics over the female sphere, and we risk ethnocentrism by presuming that all non-state and non-industrial societies do the same.

There is no doubt that women were treated differently from men in pre-colonial Papua New Guinea. Men made war; women made babies and gardens. But discrimination means more than merely differential treatment. Feminist theory, for the most part, applauds the recognition of difference. It is only when differences are used to promote inequality, when difference is used as the excuse for permitting one group access to desired goods and statuses and denying access to another group, that discrimination can be said to exist. It is not at all clear that this was the situation in pre-colonial Papua New Guinea.

---

[18]See, for example, S.C. Bradley, "Attitudes and Practices Relating to Marital Violence among the Tolai of East New Britain," in Susan Toft (ed.) *Domestic Violence in Papua New Guinea* (Port Moresby: Law Reform Commission of Papua New Guinea, Monograph No. 3, 1985) pp. 32-71; A. Chowning, "Kove Women and Violence: The Context of Wife-Beating in a West New Britain Society," in Susan Toft (ed.) *Domestic Violence in Papua New Guinea* (Port Moresby: Law Reform Commission of Papua New Guinea, Monograph No. 3, 1985) pp. 72-91.

Moreover, one cannot conclude that discrimination existed in a given culture based merely on the existence of customs that operate in some cultures in a discriminatory way. Customs take on meaning and effect from the culture in which they occur, and the same custom will therefore have different consequences in different cultural settings. A custom that is discriminatory in one culture (i.e., a custom that operates to deny women access to goods, services, jobs, status, education or respect) may not be discriminatory in another culture. For example, the requirement that men pay brideprice for their wives discriminates against women in modern Papua New Guinea, because it is viewed as the payment by a man for the household services, children, sexual favors and respect of a women. Today, men pay money for their wives, a market transaction distressingly similar to buying a car or a mango. In pre-colonial times, however, the full brideprice cycle in most Papua New Guinean societies consisted of a series of exchanges between the families of the bride and groom, and the goods exchanged did not include money. In that situation, women were not necessarily viewed as commodities for purchase, but as the not unimportant nexus of significant clan and lineage ties.

That having been said, it is nevertheless true that some Highlands cultures fostered a high level of distrust and dislike across gender lines, and that this not infrequently led to violence against women. In many Highlands societies (unlike those on the coast or islands), sex, particularly for a young man, was considered a spilling of the soul, a waste of the fluids that a man needed to succeed in battle or oratory. Women were looked upon by men as the dangerous other, continually enticing them into spilling those vital fluids. Mervyn and Joan Meggitt, anthropologists who lived among the Enga in the mid-1950s, close enough to first contact so as almost to qualify as people who knew the Enga before they were truly colonized, report that discussions by the men of adultery uncovered the antagonism with which Enga men regarded women.[19] Informants seemed to take an angry delight in describing the horrible tortures—the removal of her nose, burning sticks thrust up her genitals, death—that would be inflicted on any

---

[19]M. Meggitt, "Injured Husbands and Wounded Wives: Mae Enga Responses to Adultery," *The Australian Journal of Anthropology* (1990) pp. 96-109.

woman caught having sex with someone other than her husband. Nor was it only talk. The Meggitts did observe a number of women bearing the scars and mutilations inflicted by angry husbands. Unfortunately, though the Meggitts tell us what men said about women who committed adultery, they do not tell us what women said about men. (Indeed, much of what we think we know about pre-colonial cultures is in the writings of male anthropologists who interviewed and interacted with male informants. Without the female viewpoint, we cannot be sure that we have the total picture of these cultures.) Nevertheless, reports by the Meggitts and others suggest the existence of deep divisions between the sexes and a high degree of male anger displaced upon women—attitudes that, if they have not changed, could be among the sources for the unequal treatment of women today.

But the sources of inequity have multiplied since the 1950s. Enga, like other Highlands Provinces, has been forcibly opened up to colonialism, coffee, Christianity, colonial law and state law. Highlanders have had fifty years of colonialism and post-colonialism in which to learn how to discriminate against women. Moreover, as customs have been recognized by state courts and adopted into law (becoming, in the process, customary law), it has been primarily men doing the recognizing and adopting. It may be that the customs that have survived as customary law through the colonial period and into statehood reflect male attitudes more than they reflect the actual state of affairs in pre-colonial villages. Today's "customs" are as much a product of the colonial and post-colonial periods as they are of the pre-colonial era. Women in Papua New Guinea today are truly, in Marilyn Strathern's phrase, women inbetween—inbetween custom and customary law, custom and state law, the traditional village and the new, discrimination and equality.

IV. Village Courts and the National Court

It is, at best, an over-simplification to assume that the treatment of women in Papua New Guinea today is a product solely, or even primarily, of custom. Too many strands have been woven into the fabric of social life, each overlaying and interacting with the others, to make it possible to ascribe sole responsibility to any one. Similarly, it is not accurate to characterize cases such as that of Wagi Non simply

as examples of custom or customary institutions bested or chastised by state law or state institutions. It is possible only at the most superficial level to view the National Court, which freed Wagi Non, as a purely state institution and the Village Court, which incarcerated her, as a customary one. It is true that the National Court is a creature of state law, a descendant of the old colonial Supreme Court, and that the primary work of the National Court justices is to enforce and apply state law, including the Papua New Guinea Constitution, the statutes (particularly the Criminal Code and the Summary Offences Act) enacted by Parliament, and the common law inherited during the colonial period. It is also true that the Village Courts were intended to apply customary law, that the magistrates of the Village Courts are not trained as lawyers or judges but are village leaders, purportedly wise in the ways of custom, and that the Village Court magistrates are not supposed to adjudicate disputes or issue orders binding the parties until they have first tried to achieve a mediated settlement.

A. Courts Are State Agencies

However, the easy dichotomy between the National Court as a state or formal court and Village Courts as customary or informal courts breaks down quickly under scrutiny. Both the National Court and the Village Courts are state-created entities: neither would exist if the Constitution or a statute had not called them into being; the officials of both depend upon the government for their authority, their jurisdiction, and their salaries. Village Courts are integral parts of the state court system. They siphon off many cases that would otherwise go to the Local or District Courts. Moreover, all decisions of the Village Courts are reviewable by District Court magistrates, whether or not the parties to the decision want to appeal. No imprisonment order of a Village Court can be effected unless it is countersigned by a District Court magistrate, which means, in Wagi Non's case, that a District Court magistrate joined the Village Court magistrates in responsibility for her imprisonment.

B. The National Court Applies Customary Law

Nor is it entirely accurate to say that the National Court applies only state law. The Constitution charges all state courts (and, in particular, the National Court and Supreme Court) with the duty to formulate for Papua New Guinea "appropriate rule[s] as part of the underlying law" (which is to be Papua New Guinea's homegrown common law, given a new name to distinguish it from the imported English common law). Schedule 2.3 of the Constitution tells the courts that, when no rule exists for deciding a case, they should create a rule, which will then become the underlying law, "having regard to" the Constitution itself (and, in particular, to the statements contained in the Constitution relating to National Goals, Basic Social Obligations and Basic Rights), relevant Papua New Guinean statutes and customs, the statutes and judicial decisions of countries with legal systems similar to that of Papua New Guinea, and "to the circumstances of the country from time to time." The Constitution's insistence that the state courts should look primarily to Papua New Guinean custom and circumstances in formulating new rules for the underlying law is emphasized in Schedule 2.1 of the Constitution, which provides that a new rule need not be created if custom already contains a rule that could be applicable to a case at hand, because "custom is adopted, and shall be applied and enforced, as part of the underlying law." In effect, the Constitution turns custom, to the extent that it is explicitly recognized by the courts, into state law. Moreover, numerous statutes require the National Court to apply customary law in specified circumstances.[20]

In sorting out the fortunes of Wagi Non and other women in her position, the National Court judge did not think he was merely trumping custom with state law; he thought that it was the duty both of the Village Courts and of the National Court to apply customary law where applicable, that the Village Court magistrates had gone wrong in their application of customary law, and that it therefore became his task to set them right. The Village Court required Wagi Non to remain

---

[20]Marriage Act (Ch. 280) Sec. 3; Customs Recognition Act (Ch. 19).

as faithful as Penelope, but this contemporary Ulysses was making no attempt to find his way home:

> In the modern world, such behavior would be clearly desertion. However, according to the customary law, it is suggested that because she was put in the care of her husband's brothers and relatives, she has not been deserted and has been adequately looked after and is therefore still bound to him.... I am sure that in traditional times the man could not leave his home for such long periods and travel so far away, so problems of desertion never existed in customary times. Today the Courts are now applying the same rules without recognizing the difficulties and the obligations of husbands when they do go off for such long periods. The Village Courts must recognize the nature of the changes in Papua New Guinea and that the enforcement of custom must not conflict with the principles and rights given in the Constitution.

The judge may be saying here that there is a custom requiring women to be faithful even when their husbands have deserted them and that this customary rule cannot withstand constitutional scrutiny. He seems also to be saying, however, that the Village Court has misinterpreted custom, applying a rule from a bygone era without recognizing that customary norms change under the influence of changing social conditions.

C. The Village Courts Apply State Law

Just as the National Court often applies (or, at least, is often supposed to apply) customary law, so, too, the Village Courts often apply state law. Village Courts perform two potentially conflicting functions, operating both as popular dispute-settlement arenas and as enforcers of the community's quasi-criminal norms. These two functions do not coexist very well, but the Village Courts have been obliged to play both roles from their conception in 1973 (two years before Papua New Guinea achieved independence). There were two purposes behind the move to create the Village Courts. Some officials (Papua New Guineans for the most part, serving in Papua New Guinea's first democratically elected legislature during the brief pre-

independence self-government period) wanted there to be at least one institution within the national legal system that would reflect customary law and that would give legal recognition to the solutions arrived at when Papua New Guinean villagers met to discuss and resolve disputes. Other officials (most notably the Australian public servants who then controlled the Office of the Secretary for Law and other strategic institutions) saw village-level courts as a way to head off the rising crime rate. These disparate impulses came together in the Village Courts Act, which provides both that the Village Courts should use customary law and customary mediation to resolve disputes and that the Village Courts should punish persons who offend against village norms and local government rules by imposing fines, compensation, community service and, if those are not complied with, jail.

There were no prisons in pre-colonial days. The sanctions for adultery could be swift and cruel, but they never included incarceration. An angry husband might decide to exact immediate physical revenge on his wife or her lover (self-help was the first available response of the cuckold in pre-colonial Papua New Guinea, as it continues to be throughout most of the world today), or (fearing that the families of his wife and her lover might respond to his violence with self-help of their own) he might instead bring the matter to a meeting or moot in the village. There, big men would try to mediate the dispute; friends and relatives would offer advice, encouragement to both sides, or evidence about the illicit affair and, perhaps, about the sins of the husband that had led his wife to prefer another. Orators might speak at length, reminding the participants that there were important values and alliances that could be irretrievably disrupted if the matter was not amicably settled. The spirits would be called upon, either to clear up factual disagreements or to exact sanctions of their own. Despite the elders' advice, tempers might rise, leading to the violence that cooler heads had hoped to prevent, or a settlement might be reached and compensation paid (usually by both sides, so that no one could go away openly nursing a grudge).

Although the National Court and the Village Courts can both be said to be creations of the state, and although both apply the rules of customary law and of state law, neither can be said to operate in the fashion in which custom would act in the absence of state intervention.

The Village Courts Act provides that magistrates should attempt to mediate disputes before adjudicating them, but few in practice do so. Many village disputes are resolved in the customary ways (not only by mediation, but also by personal violence and clan warfare, despite state criminal penalties for the latter), but mediation, when it occurs, generally tends to happen outside the rubric of the Village Courts, many of which have chosen to fashion their proceedings on the model of the other state courts. Many villages have constructed Village Court buildings, with a platform for the magistrates' table. The magistrates, usually three to a case, hear evidence from both sides, quizzing the parties and their witnesses, shushing anyone else who might want to speak, and then briefly conferring amongst themselves before stating their order and their reasons for it. There are, to be sure, aspects of tradition in the conduct of Village Court hearings. Like elders or orators, the magistrates frequently lecture participants about what they should have done to conform to community norms and values. If a party vociferously refuses to accept the court's judgment, the magistrates may reconsider on the spot and permit a broader discussion of the dispute. But the elements of community participation and a joint party-centered search for a mutually acceptable solution to the dispute are lacking or, at best, under cover, replaced by a magistrate-centered proceeding that is more like the proceedings in other state courts than like the traditional village moot.

D. The Adultery and Enticement Act

The National Court held that Wagi Non's imprisonment was contrary not only to the Constitution but also to Papua New Guinea's Adultery and Enticement Act. However, the judge was not holding that the statute superseded custom; he was using the statute to reinforce his view that the Village Court had applied custom wrongly. The Adultery and Enticement Act was brought into force in 1988 to accomplish two aims. It was intended both to decriminalize adultery and to counteract 100 years of discriminatory treatment of Papua New Guineans by the Australian colonial administration. Prior to the passage of the Act, adultery had been a criminal offense under state law, punishable by a fine or imprisonment for up to six months.

However, because the adultery laws had not been contained in the Criminal Code or the Summary Offences Act, but in the Native Regulations, which had been promulgated by the colonial administration to rule the natives of Papua New Guinea, they had applied only to native-born Papua New Guineans, and not to naturalized citizens or foreigners. Under the Regulations, Wagi Non could have been found guilty of adultery but an expatriate could not. The Act, which repealed the Regulations, applies to everyone in Papua New Guinea "regardless of customary differences, sex, or nationality."[21]

In its decision in Wagi Non's case, the National Court focused on the requirement in the Act that courts mediate adultery disputes:

> The new Adultery and Enticement Act...puts strong emphasis on mediation in adultery situations realizing that adultery situations may have arisen out of other family problems. However, it is quite clear that the Village Court has paid no heed to such considerations in its dealing with this matter. There cannot have been any attempted mediation because the husband was not there to discuss the problem....

Technically, the Adultery and Enticement Act does not apply in the Village Courts.[22] If the National Court judge had wanted only to remind the Village Court magistrates that they ought to have tried to mediate this dispute, he could have referred them to the Village Courts Act itself, which requires Village Courts to mediate all disputes before holding formal hearings and issuing orders. He did not need to

---

[21]The Act provides at Sec. 4 that a wronged spouse may bring a claim against the adulterous spouse, the consort, or both. If the spouse proves his or her claim, Sections 12 to 16 of the Act provide that damages of up to K1,000 (approximately US $750) may be awarded, the exact amount depending upon such considerations as how much the defendants earn, any financial hardship that the damages award might provoke, and whether customary compensation has been paid. For an overview and critique of the Act, see O. Jessep, "Compensation for Adultery in Papua New Guinea: The Adultery and Enticement Act 1988," 17 *Melanesian L.J.* 1-9 (1989).

[22]As provided in Sec. 21 of the Adultery and Enticement Act, claims under the Act are supposed to be brought to a Local or District Court, not to a Village Court. The Village Courts are not mentioned in the Adultery and Enticement Act, and, under Section 58(1) of the Village Courts Act, the Village Courts are bound only by the Constitution and those statutes that specifically refer to the Village Courts. Thus, despite passage of the Act, Village Courts are still technically free to treat adultery as an act that violates customary norms and to punish those who offend against those norms.

mention an Act that they need not follow. I expect he chose to bring the Adultery and Enticement Act to the attention of the Village Court magistrates for two reasons. First, if Village Courts continue to make incarceration orders in adultery cases, then Papua New Guinea would still have two adultery laws applicable to different groups of people, just as it did before the Act was passed. Only the make-up of the groups would have changed. Papua New Guinean villagers who commit adultery would be subject to imprisonment, whereas townspeople would be subject only to the civil damages provided for in the Adultery and Enticement Act.

The judge's second reason, I think, for referring to the Adultery and Enticement Act was his perception that, by imprisoning women found to have committed adultery, the Village Court was treating adultery as a crime when, to his mind, they should, following the spirit of the Act, treat it as a civil matter. The Village Court might have believed it was merely underlining the importance of the customary prohibition on adultery when it ordered Wagi Non to prison, but the National Court saw a clear distinction between civil and criminal matters, between matters that are resolved through compensation or damages and those that result in incarceration. This is a distinction, however, that does not exist in customary law.[23]

In a state society, it is generally presumed that the community will demonstrate its abhorrence of certain acts by labelling them as criminal and providing courts, police and jails to handle them. Pre-colonial societies depended upon victims to seek their own recompense, not because the community did not take the wrongs seriously, but because non-state societies did not have courts, police or prisons. However, victims did not go after the wrongdoer on their own. They looked to their kin, fellow clan members and neighbors for support. Everyone in the village would get involved in sorting out disputes and in righting wrongs. No one could avoid personal responsibility by leaving these

[23]It used to be said that custom, by leaving it to the wronged party to seek his or her own recompense, treated all wrongs as torts, as non-criminal, and one could almost hear the sniff of lawyerly disdain with which this was said, as if customary peoples were somehow incapable of knowing when something was wrong enough to be treated as a crime. But the artificial distinction made by the common law has never been easy to grasp; even law students find it illogical, particularly when the same action can subject a defendant both to criminal penalties and to a civil suit.

vital community tasks up to the state. It could therefore be argued that people in non-state societies treated wrongs more seriously, and took more personal responsibility for resolving disputes, than people in state societies do.

In denying that Wagi Non should be imprisoned, the judge was making a statement not only about customary law but also about the acceptable uses of the institutions of state law. He was pointing out that, in state societies, courts have two roles: they serve the state, sanctioning those who challenge the state by breaking its laws, but they also serve as arbiters of private disputes, helping the parties to reconcile their differences, much as village gatherings used to do. In his view, adultery is a family matter, and family matters are private; they do not usually involve a challenge to state authority and, therefore, ought not often to invoke criminal penalties.

While I agree that Wagi Non ought not to have been jailed, I am not sure that her freedom should turn on the distinction between public and private matters. It is difficult to determine when a court should limit itself to the role of arbiter of private disputes and when it is speaking for the state. After all, it is itself an arm of the state and, as such, is always speaking for the state. Its order, its decision in a case, even in a case that concerns a family dispute, is an order of the state, and a party's refusal to obey that order becomes a challenge to state authority. Nor does one want to consign all "family problems" to the realm of the private and non-criminal. In this situation, the distinction helped Wagi Non to go free. In another, it could allow the husband who beat or raped her to escape the consequences of his actions. Privatizing women's concerns minimizes them, which does not help women in the long run.

E. When Custom Becomes State Law

It is difficult (more, it is impossibly inaccurate and imprecise) to say that custom imprisoned Wagi Non and that state law freed her. One could, with somewhat more accuracy and precision, say that custom imprisoned her and custom freed her, or that state law both imprisoned her and set her free. Most accurately, one should say that, twenty years after Papua New Guinea became an independent state, the manifold actors in its legal system are still trying to work out the

proper balance between customary law and state law, and more mystified than ever as to what custom really is, a quest made more difficult by the changing economic, social and political circumstances of the country, circumstances which are affecting and changing the meaning and impact of custom and state law, as well.

V. What is Customary about a Faithful Wife?

Although the holding in Wagi Non's case seems to be that the customary rule applied by the Village Court is unconstitutional, at different places in his opinion, the judge also seems to suggest that there is no customary rule governing the case. There cannot now be a rule in customary law requiring that a wife remain forever faithful to a long-absent husband, he says, because "I am sure that in traditional times the man could not leave his home for such long periods of time and travel so far away so problems of desertion never existed in customary times." The judge suggests that there might once have been a rule that women should remain sexually faithful regardless of what their husbands did, but it was a rule created for circumstances that no longer exist: "Today the [Village] Courts are now applying the same rules without recognizing the difficulties and the obligations of husbands when they do go off for such long periods." If it is no longer a rule of customary law, he seems to be suggesting, then the Village Court ought not to be applying it, because the Village Courts are supposed to apply custom as it actually exists, not as it once might have been.

"The Village Courts," the judge says, "must recognize the nature of the changes in Papua New Guinea and that the enforcement of custom must not conflict with the principles and rights given in the Constitution." It seems that the Highlands villagers have reacted to "the changes in Papua New Guinea" by creating new customary norms, but that these new norms are unconstitutional—and are so because of "the changes in Papua New Guinea." Are the villagers' "changes" and the Constitution's "changes" the same? Was the Village Court in Wagi Non's case applying custom that is currently viable or was it reaching back to the now dead customs of a bygone way of life? In answering these questions, we may reach some understanding of what custom is

and whether custom can still be said to exist in the face of the vast changes that have occurred to Papua New Guinea's traditional cultures as a result of colonialism and its aftermath.

The judge is probably correct in his surmise that men in the Highlands did not travel far or long in pre-colonial times. Men who lived on the coast and islands ventured far from home on trading voyages that might last several months (and did not expect their wives to practice total abstinence while they were gone). But, in the Highlands, there were too many dangers from hostile clans just over the next ridge, let alone from unknown enemies farther away, for men to wander far from home. Mel, one of the legendary great men of the Melpa of the Western Highlands, earned his fame and status in part by daring to journey from his home in the Wahgi Valley into the Jimi to collect bird of paradise feathers, but that renowned exploit, courageous as it was, took several weeks, not many months or years.

Lengthy stays away from home became a Highlands practice only during the colonial period. There is a nice symmetry in Wagi Non's husband staying away in order to work on a plantation, because it was the Australian planters who first separated Highlands families for months at a time. The "boys" (who could be anywhere from 15 to 50) hired to work on the plantations were bound by one-year contracts. Government supported capital in the colonies: a worker's breach of his contract—especially the dread breach of leaving before one's time was up—was a criminal offense, punishable by flogging and imprisonment. The colonial police would return runaway workers to the plantation. (There were, of course, no concomitant penalties for breaches by employers.)

Living conditions for workers on the plantations were not conducive to family life. In fact, families were actively discouraged from joining their husbands and fathers at or near the plantations. Workers lived in dormitories, decidedly men-only accommodations; the pay was insufficient to support a wife and children, unless the wife and children stayed behind in the village, to be cared for by the husband's family. Many men stayed at the job for only a year, returning home with a little money, some bolts of cloth, an axe or a knife (the few things that their meager pay enabled them to purchase), but there were also men who signed on for longer, sometimes staying away from home for years at a time.

It was left to the folks in the village (and their menfolks) to adapt to these new conditions as best they could. I have no doubt that they did so in the way that people usually do—by modifying existing customs to suit the changed circumstances. It had always been up to a man's kin to care for his wife and children (dig out new gardens for the wife to till, give them the husband's share of ceremonial pork, repair their home when necessary) should he fall ill or die; no small stretch to support them when he disappeared into plantation labor. It would not be surprising that the husband was not heard from for months at a time. Probably, there was no word of him until his return, unless a co-worker from the same or a nearby village happened to return earlier than he, bringing word of him. No one read or wrote and, if they had, there was no one to deliver the mail. A wife whose husband was away on a plantation would be expected to remain loyal to her husband. After all, it was her husband's family who was taking care of her and of her children. Moreover, in marrying, she had not merely taken on a husband, she had taken on a new family, and a responsibility to aid that family, to help to maintain its good name, which she could do by acting the role of the faithful wife.

The ability of village people to adapt suited the interests of expatriate colonial society well. If wives and children were supported by the subsistence economy of the village, then there was no need to pay men the high wages that Australians would demand, wages high enough to support a family, and there was no need for housing, health insurance, education, social services or any of the demands that workers' families would make upon employers or government. If this situation was caused by the colonizers, can it be called customary? There are different answers to this question, depending upon whether one is an anthropologist or a lawyer, and on one's political perspective. Anthropologists would probably say that it is customary, because custom is no more than the way that people in a culture behave (or think that they ought to behave) at any given time. Custom, the anthropologist would say, is not just the norms and values that guided behavior 100 years ago. Since custom is not enacted into unchangeable written rules, since it is constantly made and remade by people acting and reacting within the terms that they believe are set for them by their culture, it consists, at any time, of the norms and values that guide

behavior at that time. If new norms have developed in the Highlands governing how wives should behave when their husbands are away, then those are the customs that the courts must deal with.

Lawyers might be less certain that new customs can be accepted as part of court-made customary law. Prior to independence and the adoption of the Papua New Guinea Constitution, the aim of the colonial courts (and the colonial administration in general) was to make Papua New Guinea's laws and legal system just like those of Australia, and to do so as quickly as possible, while still recognizing that Papua New Guineans, untutored in the imported laws, could not always be held accountable for acting according to custom. In this atmosphere, the Customs Recognition Act (then called the Native Customs Recognition Act) provided that the courts could recognize and apply certain customs (most notably, those relating to land and family matters, or those useful to the court in determining the appropriate sentence for a criminal defendant), but only if the customs had "existed from time immemorial."[24] This limitation on the recognition of custom by the courts in the colonial period was excised by the Constitution, which defines custom as

> the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.[25]

While this definition permits the courts to acknowledge that cultures and customs change, it does not resolve all the problems that confront a classically trained judge or lawyer in trying to determine what is customary and what is not.

Since law does not consist merely of what people do but of what someone (in the case of state-made law, the government) believes people should do, then, in the judicial context, does custom consist merely of what people do, or must it be limited to norms and values, to what people think they should do? And, if the latter, which people's

---

[24]Customs Recognition Act (Ch. 19).

[25]Papua New Guinea Constitution, Schedule 1.2(1).

norms are to be recognized? It seems that everyone whose opinion mattered in Wagi Non's village (perhaps even including Wagi Non herself) believed that women who commit adultery ought to be jailed if they cannot pay the compensation demanded of them. But the drafters of the Constitution did not think so. The judges of the National Court do not think so. Many women, particularly educated women, throughout the rest of Papua New Guinea do not think so. If the court decides that this is not a custom, then is it depriving this village (which, we must remember, was, until it was forcibly colonized, an independent and self-governing polity) of its customary law? If the court decides that this is a custom, will this custom then be enforced upon the women who do not believe in it? Might it be enforced in villages that do not follow it, or will Papua New Guinea have a different law for every village, so that a woman's fate will depend upon where she happens to be when a complaint is brought against her?

For the villagers, the circumstances that changed (thereby changing the import and effect of their customs) were the colonial invasion of Papua New Guinea and the concomitant development of the plantation system. Peter Fitzpatrick is among those who have said that the colonizers so altered custom as to make it inaccurate to refer to anything Papua New Guineans do today as customary.[26] While it is possible to see many of the changes to custom that occurred during the colonial period simply as a response by villagers to changes in politics and economics, it is impossible not to recognize that the colonial administration had a hand in channeling and directing the changes to custom, whether directly or indirectly. For example, although young men may have chosen to go away to the plantations, instead of performing their traditional roles in the village, they made the choice in circumstances engineered by the colonizers. The colonial administration made plantation work necessary by imposing taxes on villagers, and it made plantation work seem desirable, by banning clan warfare, which left many young men with nothing much useful to do at home in the village.

---

[26]P. Fitzpatrick, "Traditionalism and Traditional Law," 28 *J. African Law* 20 (1984).

Fitzpatrick's insight is useful because, if nothing else, it enables us to see that it is inaccurate to view Wagi Non's predicament simply as a case of [bad] customs confronted by [good] state law. Her incarceration (like most of the problems women are confronting in Papua New Guinea today) is not the result of villagers clinging obdurately to ancient and outmoded norms. It is the result of villagers trying to come to terms with colonialism and statehood, re-inventing their customs to make life possible under changing economic conditions. The changes that the villagers see, the changes that find voice in their emerging norms and values, are changes in their relationship to the means of production and to the sources of political power. The changes that the judge sees, the changes that causes him to question their choices, are changes that have happened so far only in words—the words of the Constitution, the words of the daily newspapers.

VI. Equality and the Extended Family

The National Court presumes, without discussion, that the wounded husband is the only party that the law should recognize as having been injured by Wagi Non's adultery, that his family have no standing in the matter:

> [O]ne unusual feature of this matter is that it was not the husband who made the complaint to the Village Court but it was the husband's relatives. It would also appear that the husband never had and still has no knowledge of what happened. Surely it is the husband who is the aggrieved party....

Yet, it was his family who, as the Village Court magistrate tries to point out to the judge, supported her and her children in her husband's absence. It is clear that, under customary rules, they had standing to complain about, and seek recompense for, her behavior.

Western family law, as exemplified in Papua New Guinea's Marriage Act, is posited upon the ideal of a man and woman voluntarily consenting to marry one another. Once they do, they are expected to live together with their children as a nuclear family. Most Western market economies (and, as a result, Papua New Guinea's cash

economy) depend upon the continuing existence of the nuclear family. Until the 1980s (when wages in most Western countries became too low for a single breadwinner to support even the relatively small demands of a nuclear family), wages were generally set at the amount that would cover the needs of a man, one wife and children; they were not sufficient to include too many other relatives, so households that included grandparents, aunts and uncles or other family members were frowned upon.[27] The developing industrial economies of the West depended upon a large pool of workers willing to travel wherever the jobs were; a man encumbered only by a wife and children can pick up stakes more lightly than can a man who is part of a large, extended family. Adultery, in Western society, is a matter solely between the husband and wife; it is a denial of the continuity of their monogamous relationship.

In traditional Papua New Guinean cultures, marriage is not a matter that concerns only the husband and wife. Two larger families are involved. Since the married couple will reside either with the husband's family or the wife's, their families expect to have some say in who this new family member will be. In most of the Highlands, women will live with their husbands' families, so there is much concern about whether she will be a good worker and will produce the children whose existence guarantees the continuity of the husband's clan and lineage. The marriage signifies not just the advent of a new relationship between a man and a woman, but also the creation of ties between his clan and hers. Once related by marriage, members of the two families will depend upon one another for trading and exchange partners, as wartime allies, and as co-givers at feasts and funerals. Marriage in the Highlands signifies the development of alliances that aid the subsistence economy by bringing more workers into it, as well as new avenues for ensuring the security of the family and for obtaining needed goods.

Adultery in Papua New Guinea's traditional villages is an affront not only against the husband but also against his family. In entering

---

[27]This may also explain the Western world's hostility to polygamy; so long as men were supposed to be the sole breadwinners of the family, polygamy was feared because it might impel men to request higher wages.

the marriage, each spouse has bound himself or herself not only to the other spouse but to their kin as well. In the patrilineal societies of the Highlands, it is probably true that a woman owes more of an obligation to her husband's family than he does to hers. By paying brideprice to her kin, her husband's family has pledged to treat her as a member of their own clan, and to care for her and her children. She expects to count on the continuing support of her husband's family even after her husband dies. In return, she owes them continuing fealty. If she did commit adultery, Wagi Non failed in her duty not only to her husband but also to his family. In deciding Wagi Non's case, however, the National Court judge discounted the family's involvement, viewing his abandonment and her adultery merely as "problems between the husband and wife." In prohibiting Wagi Non's in-laws from pursuing the complaint against her, the judge has changed the meaning of customary family law, making it more like Western concepts of marriage.

I expect that the judge did not do this without thinking through the consequences. There is a reason in Papua New Guinea to break down the old norms of customary marriage, and the reason lies in Papua New Guinea's economy. If Papua New Guinea is to develop a market economy on the Western capitalist model, as its leaders want it to do, then it behooves it to subvert the traditional family structures, which make it difficult for workers to move easily from job to far-off job and which make prevailing (low) wages unattractively insufficient. However, the court might also note that, to date, Papua New Guinea has tried to use traditional family structures as a way to achieve economic development more cheaply. By depending upon the extended family back in the village to take care of wives, children, the old and the unemployed, the government has not found it necessary to institute the social taxes common in other industrialized nations. Not everyone in positions of economic power in Papua New Guinea would be happy if customary obligations to and by the extended family were done away with.

VII. Desertion, Polygyny and the Meaning of Equality

In the eyes of the National Court judge, the husband's fault in being so long away is the central fact in Wagi Non's case. He was,

the judge believed, the only person with standing to complain about Wagi Non's affair. More importantly, because he was free to travel while she was bound by customary rules of fealty, she was denied the equal protection guaranteed by section 55 of the Constitution. Finally, because she was required to be "bonded almost in slavery to the husband even when the husband neglects her," the Village Court's treatment of her conflicted with the "National Goals of equality and participation."

It is easy to agree that what happened to Wagi Non was cruel. But in precisely what ways did it deny her equality? The Annual Report of the Judges for 1990, which commented upon Wagi Non's case, makes it clearer:

> Some men have left their wives for up to 6 years and have never supported them or taken any interest in them back in the village. Often the men have gone to the coastal towns for jobs or even far island provinces. However, as soon as they hear that the wife has decided to go with another man they rush home and take them to court to seek compensation. Again it appears that there is one law for men (they can take as many wives as they want, have as many girlfriends as they want) and there is another law for women, they clearly cannot associate with any other men.... Men can...desert their wives for years, take a new wife elsewhere where they are living, yet women are bonded almost in slavery back in the village to those men, even if they give them no support.... Men treat marriage so lightly and get new wives or girlfriends; they neglect their older wives and this often leads to domestic strife....[28]

The inequality arises because men can have second (or third—or more) wives, and women cannot. When a man takes up with another woman, it is called polygamy and is not considered unlawful; if a woman takes up with another man, it is called adultery and is treated as a crime. The judge never accuses Wagi Non's husband of having taken up with another woman, but there are clear implications that he might have. Who else has been doing his laundry for six years? And

---

[28]Papua New Guinea Supreme Court, *Annual Report by the Judges 1990*, supra, pp. 7-8.

there is no suggestion that he has divorced Wagi Non; to the contrary, his family still assumes that they are responsible for her—and she to them. So we are left, as the judge seems to have been, with the suspicion that Wagi Non's husband has a second wife far off in East New Britain.

Polygamy was not uncommon in traditional Papua New Guinea, and, although the missionaries frown on it, it is not unheard of in its traditional form today. Christianity has had some impact in decreasing the number of polygamous marriages, but economics has probably played a greater role. Even in pre-colonial times, since marriage required the payment of bridewealth, few men could afford a second wife. However, once a man was able to afford additional wives, he probably would try to find them. In addition to helping him (and his other wives) to till more gardens and raise more pigs, each new wife brought him the opportunity for expanding his alliances through exchanges with her family. Today, there is less to be gained from (and more cost involved) in adding additional wives to the family, especially for men who live in town or who are heavily invested in cash cropping.

It is, however, not uncommon in Papua New Guinea today for men to have two wives, one in the village and another near where he works in town. Sometimes the wives know about one another's existence; sometimes they do not. Sometimes the man has married both wives by custom; often, he has married his village wife according to custom and his town wife in a church or civil ceremony; more often, though, he has married his village wife according to custom, he and his town wife live together without being in a relationship that the state would recognize as a legal marriage.[29]

At least two questions are raised by the continuing existence of polygamous unions. First, if (as the judges state in their Annual Report and imply in the Wagi Non case) polygyny unconstitutionally discriminates against women, why have the courts not taken the

---

[29]The Papua New Guinea Marriage Act recognizes the validity both of statutory marriages (marriages performed by a person, including a member of the clergy, who is authorized to officiate at a statutory marriage) and customary marriages (marriages that are entered into in accordance with the customs of the parties). Nothing in the Act makes polygamous marriages illegal, so long as all of them are customary. A person commits the crime of bigamy only if he or she has a spouse (either through a customary or a statutory marriage) in addition to the spouse that he or she married under the statute.

opportunity to declare polygamous marriages unlawful? And, since the possibility of polygamy inheres in most customary marriages in Papua New Guinea, meaning that every woman in such a marriage is in an unequal position, then are all customary marriages unconstitutional?

The judge in Wagi Non's case did not go so far as to declare polygamy itself unconstitutional: "I am not saying that a man cannot have several wives and travel but if he chooses to have wives and travel elsewhere he must accord them equality in care and participation and she must have the same freedoms that he has." The judge does not say exactly how a husband might accomplish these objectives. But the court is not alone in its uncertainty about what to do about polygyny. In 1978, in a proposed redraft of the Marriage Act, intended to make the statute, which had originally been imported with few changes from Australia, conform more to the circumstances of Papua New Guinean society, the Law Reform Commission did not suggest that polygamy be entirely abandoned.[30] Women's groups in Papua New Guinea see two sides to the issue. More recently, the Law Reform Commission, propelled by many women's groups, did issue a report calling for the abolition of polygamy.[31] However, in 1991, when it was reported that the newly-appointed Governor-General of Papua New Guinea had taken only the second of his two wives to the installation ceremonies at Buckingham Palace (so that she became a Lady, and his first wife did not), the daily press quoted representatives of women's groups who argued that both wives should be given the title. Although there is not necessarily any conflict in wanting both to abolish polygamy and to treat with respect women who are in polygamous marriages, the furor caused by the Governor-General's gaffe did bring into stark relief the

[30]Papua New Guinea Law Reform Commission, "Family Law" (Port Moresby: PNG Law Reform Commission, Working Paper No. 9, 1978). For a critique, see H. McRae, "Reform of Family Law in Papua New Guinea," in David Weisbrot, Abdul Paliwala and Aki Sawyerr (eds.) *Law and Social Change in Papua New Guinea* (Sydney: Butterworths, 1982), p. 132.

[31]Papua New Guinea Law Reform Commission Task Force on Family Law Reform, "Press Release," June 20, 1990.

conflicting emotions that swirl around the subject in Papua New Guinea today.[32]

It is not clear whether polygamy contributed to women's inequality in pre-colonial times. It is true that there is an inequity inherent in the notion that men can have many wives, while women cannot have many husbands, but there are those who argue that polygyny was downright good for women.[33] In a subsistence economy, where one's livelihood depended upon access to gardens and where land allocation was controlled by men, women prospered only if they were married, and the woman married to a man with plenty of land prospered most, even if she had to be one of several wives to do it. Highlands societies were often at war, and women depended upon men for protection. Certainly, in cultures such as those in the Highlands, where men interacted mainly with men and women with women, a polygamous household probably did not consist so much of a group of women all vying for the attention of one man, as it did of a group of women working and socializing with one another.

There is a telling flaw in these attempts to tout the supposed merits of polygamy. If marriage is so necessary to a woman's security that she will accept a role as a co-wife in order to get married, then that woman is probably living in a society in which the sole access for women to the necessities of life is through men, and that is not a description of a society in which women have equal status or power.

Polygamy, like other customs, can foster either equality or inequality, depending upon the nature of the culture in which the custom occurs. As Murray and Kaganas point out, the existence of polygyny in itself does not necessarily lead to the conclusion that women are less respected than men:

> The concept of equality implies a comparison, and an assertion that equality is denied suggests that one category of people enjoys advantages that another category does not. But one can hardly

---

[32]For a description of the reactions to the Governor-General's choice of a Lady, and a thorough discussion of the law relating to polygamy today, see O. Jessep, "The Governor-General's Wives—Polygamy and the Recognition of Customary Marriage in Papua New Guinea," *Australian Journal of Family Law* 29-49 (1992).

[33]See, for example, C.R.M. Dlamini, "The Role of Customary Law in Meeting Social Needs," *Acta Juridica 1991* (Capetown: Juta & Co., 1991) pp. 71-85.

> suggest seriously that feminist objections to polygyny would be addressed if women were given the same opportunities as men to accumulate spouses. The notion of a woman acting as wife to more than one man suggests greater oppression, not liberation.[34]

Of course, the conclusion that multiple husbands oppress women but multiple wives do not oppress men is correct only in a society in which women are second-class citizens, suggesting again that customs take their flavor, discriminatory or not, from the culture of which they are a part.

In the Papua New Guinean Highlands, polygamy probably was part of a cultural context that generally discriminated against women. In those cultures in which women are presumed to be the equal of men, polygamy can support that equality. Among the Navajo in North America, for example, where women were recognized as tribal leaders and landowners and made the important decisions about their own lives, polygamy was adopted by women when it suited their purposes. It did not contribute to women's having a lesser status. In their excellent discussion of Navajo family law, the Zions point out that Navajo women who entered into polygamous marriages were usually sisters who wanted to stay together and support one another.[35]

The response of the colonizers to polygamy is no indication of whether it is discriminatory. The colonizers who frowned on polygamy did not do so out of any great belief in female equality. Australia was a patriarchal society itself. An Australian woman, although she was her husband's only wife, was supposed to be his servant, helpmeet and general factotum. The colonizers did not disdain polygamy because it discriminated against women; they disliked polygamy because it was unAustralian, unChristian, smacking of licentiousness and illicit pleasure. They feared that it, like other Papua New Guinean customs, would undermine the values (not to mention the economic system) they were trying to implant in the colony. Although they did not outlaw polygyny, they expected that it would wither away as Papua New

---

[34]F. Kaganas and C. Murray, "Law, Women and the Family: the Question of Polygyny in a new South Africa," *Acta Juridica 1991* (Capetown: Juta & Co., 1991) p. 116, 127.

[35]J.W. Zion and E.B. Zion, "Hozho's Sokee'—Stay Together Nicely: Domestic Violence under Navajo Common Law," 25 *Arizona State L.J.* 407-426 (1993).

Guineans gradually came to accept the purported benefits of civilization. And, it might be noted, the American colonizers were as anxious to stamp it out amongst the Navajo as the Australians had been to rid it from Papua New Guinea.

The issue for Wagi Non and many other women in Papua New Guinea today is not whether the institution of polygyny discriminated against women in pre-colonial times, but whether the practice of having a town wife and a village wife harms women in contemporary Papua New Guinean society. The problem for most women in such unions, as the Wagi Non case demonstrates, is that men do it when they cannot afford to, endangering the well-being of their wives. Wages are low in Papua New Guinea compared to the costs of food and housing in the towns. If a man is supporting a town wife, he is unlikely to have anything left over for his village wife, who like Wagi Non, will be forced to depend upon his relatives for the housing, food, and clothing that she and her children need. Even though the National Court probably has seen to it that his village wife does not run the risk of prison, should she choose to deal with her difficult situation by finding a new source of support, she still runs the risk of village censure. Because her family has received a sizeable brideprice, she may not be in a position simply to leave her marriage.

Women perhaps fear that the phenomenon of the town wife and village wife cannot easily be eradicated because polygamy has such a long history in Papua New Guinea. But this presumes that the current practice springs from or is in some way related to the traditional institution, and it may not be. Polygamy as part of Papua New Guinea's traditional cultures is a perquisite of rural big men. The current practice of bigamy is for the most part a stratagem of young men (and women) coping with the exigencies and uprootedness of life far from home in new towns that have yet to define a social ethics for themselves. It has no more to do with traditional polygamy, which was deeply intertwined with other aspects of clan culture, than do say, the sexual mores of undergraduates in Sydney, London or New York.

VIII. Conclusions and Afterthoughts

There is a long simmering debate in Papua New Guinea over the causes of and solutions to women's inequality. Is it a product of pre-

colonial (and continuing) customary law? Those who argue that it is point to customs such as polygamy, brideprice and arranged marriage, virilocal residence, and the ownership of all property by the clan (in effect, by the male big men or elders of the clan), which made women seemingly the property of men. Others argue that inequality is the product of colonial rule, which, patriarchal itself, tended to support and rigidify the most patriarchal elements of custom. Finally, there are those who insist that inequality is the product of Papua New Guinea's contemporary political and economic situation, in which once beneficial elements of custom become deleterious. All do agree, however, that, despite the bow to equality contained in the Constitution, very little has occurred since independence to improve women's status. Most everything about custom that might interfere with the economic successes of the elite of the new state has been modified or overturned, but those aspects of custom that support the elite, such as the continuing denial of equality to women, have been overlooked or sustained.

In this context, the continuing willingness of state law to recognize and uphold customary family law, while ignoring customary economic rules, takes on new meaning. Since most women are consigned to the realm of the family, they bear the burden of whatever inequality is inherent in the continuation of customary rules of family life. By invoking the Constitution to sort out a "family problem" in a traditional village setting, J. Woods has put the National Court, for the first time, squarely into the middle of the debate over the causes and solutions to the inherent inequality of women in Papua New Guinean society today. He has pitted state law (as embodied in the Constitution) against custom at its source.

It is not clear, however, that what is in conflict in Wagi Non's case actually is state law and customary law—at least, not customary law as it existed in pre-colonial times. It may be that what is happening in Wagi Non's case is that two newer versions of customary law are in opposition—the customary law that has been devised in the villages to meet changing needs and circumstances and the customary law of the state courts.

Application of Wagi Non is an important case in the development of Papua New Guinean law because it brings the question of women's

place in Papua New Guinean society directly into judicial discourse for what may be the first time. Women have been talking about, and attempting to take action to remedy, their unequal status in Papua New Guinean society since independence (and for some time before that), but this may be the first case to take note of their arguments. I do not know of any Papua New Guinea case other than those that concerned the women imprisoned by Village Court orders that has invalidated a customary rule on the basis that it conflicts with the Constitution's requirements that women be treated equally. It is interesting that the cases arose in a village context. The great majority of Papua New Guinean women live traditional village lives; relatively few women have obtained educations, paid employment and a flat or house in town, yet one might nevertheless have expected the first major case to come from the struggles of women in the towns, since it is they who have been most vocal about the maltreatment of women in Papua New Guinea today. That it did not illustrates the close links that still exist between town and village women and the extent to which town women have been able to give voice to their sisters in the village.

Since 1991, Village Courts in the Highlands seem to be incarcerating fewer women for breaches of family law, but it is difficult to know whether it is the Village Court magistrates or the women ("don't try to leave him or you'll end up in jail") who got the message. Meanwhile, the National Court finds itself embroiled in its own sex discrimination problems. Recently, one of the judges of the National Court (not one of those who had been instrumental in freeing the incarcerated village women), sentenced a defendant to four years at hard labor for carnal knowledge of the defendant's six-year-old stepdaughter, explaining to the defendant that the problem was not his yen for sex, it was his yen to have it with the wrong person: "If he wanted sex, then I suppose he is entitled to rape his wife to satisfy his desire for sex."